(4)

No. 88-302

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES A. GORDON, Special Deputy State Insurance Commissioner of Maryland and Receiver for Eastern Indemnity Company of Maryland,

Petitioner,

—v.—

UNITED STATES DEPARTMENT OF THE TREASURY, *et al.*,

Respondents.

BRIEF *AMICUS CURIAE* OF JAMES P. CORCORAN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSEPH TERMINI
TERMINI & EPSTEIN
123 William Street
New York, New York 10038
(212) 341-6400
Of Counsel

MATHIAS E. MONE*
MARC J. KORPUS
THOMAS J. MCKENNA
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000
**Counsel of Record for* Amicus Curiae

September 16, 1988

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This brief amicus curiae is respectfully submitted on behalf of James P. Corcoran, Superintendent of Insurance of the State of New York, as Liquidator of eleven insolvent insurance companies domiciled in the State of New York: American Consumers Insurance Company, American Fidelity Fire Insurance Company, Carriers Casualty Company, Constellation Reinsurance Company of New York, Dominion Insurance Company, Midland Insurance Company, Nassau Insurance Company, Northumberland General Insurance Company (U.S. Branch) and Union Indemnity Insurance Company of New York. Pur-

suant to Rule 36 of the Rules of this Court, amicus has obtained and filed herewith the written consents of each of the parties to the filing of this brief. Amicus supports the petition of the Maryland Deputy Commissioner for a writ of certiorari to review the decision of the Court of Appeals for the Fourth Circuit in this case.

INTEREST OF THE AMICUS CURIAE

Amicus is the Superintendent of Insurance of the State of New York in his capacity as domiciliary liquidator of eleven insolvent insurance companies chartered by or having their United States domicile in the State of New York. These insurance companies are being liquidated in the courts of the State of New York under provisions of New York's statute governing the rehabilitation and liquidation of insolvent insurance companies, Article 74 of the New York Insurance Law, N.Y. Insurance Law §§ 7401, *et seq.* (McKinney 1985 and Supp. 1988). New York's insurance insolvency law, which embodies the Uniform Insurers Liquidation Act, 13 U.L.A. 328 (1986), is similar in many respects to the provisions of the Maryland Code under which the Petitioner herein is liquidating Eastern Indemnity Company of Maryland. In addition, the Superintendent of Insurance acts as rehabilitator of New York-domiciled insurance companies whose financial condition is impaired, and as ancillary receiver or conservator of insurance companies that are domiciled in other jurisdictions and are undergoing insolvency or delinquency proceedings in those jurisdictions. Altogether, as of the most recent period for which statistics are available, amicus as liquidator, rehabilitator, or receiver was responsible for the administration of proceedings in the New York courts involving 36 insurance companies with total reported assets of over $515 million. Definitive resolution of the impact of the federal priority statute, and the wider issue of the application of the McCarran-Ferguson Act to state insurance insolvency systems, is of the first importance to amicus, and to the policyholders of the insurance companies undergoing liqui-

dation in the New York courts under the administration of amicus as liquidator.

SUMMARY OF ARGUMENT

The writ of certiorari sought by Petitioner should be granted to decide whether under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (1982), the specific provisions of state statutes regulating the liquidation of insurance companies may be superseded by a federal law of general application like the federal priority statute, 31 U.S.C. § 3713 (1982). Federal courts sitting in New York, including the Federal Court of Appeals for the Second Circuit, have ruled that the McCarran-Ferguson Act permits New York's insurance insolvency statute to operate free of federal interference. These courts have recognized that in New York, as in other states, the liquidation of insolvent insurance companies is the final chapter in a comprehensive scheme of state regulation of the business of insurance. The ruling of the Fourth Circuit below, holding that Maryland insurance insolvency provisions are not protected under the McCarran-Ferguson Act, raises a conflict among the circuit courts that requires resolution.

ARGUMENT

The applicability of the McCarran-Ferguson Act is vital to state insurance insolvency proceedings.

Amicus, as liquidator of insolvent insurance companies in New York, strives to discharge his duties in conformity with applicable law, both state and federal. The New York Insurance Law very specifically governs procedure and substance in insurance liquidation proceedings. For example, the New York Court of Appeals has construed Article 74 of the New York Insurance Law to confer exclusive jurisdiction of all property of and all claims for and against an insolvent company in liquidation on a single state court—the liquidation court. *Knickerbocker Agency, Inc.* v. *Holz*, 4 N.Y.2d 245, 149 N.E.2d 885,

173 N.Y.S.2d 602 (1958). Article 74 establishes, *inter alia*, detailed provisions for the appointment of the Superintendent of Insurance as liquidator (N.Y. Insurance Law § 7405), for the recovery of preferences and other voidable transfers (§ 7425), for offsets (§ 7427), for the disposition of assets and the compromise of claims (§ 7428), for the proof and allowance of claims (§ 7433), and for distribution of assets according to a scheme of priorities established by statute (§§ 7413, 7426, 7434), all under court supervision and pursuant to appropriate court orders.

In satisfying his statutory obligations as liquidator, the Superintendent of Insurance as liquidator has relied on repeated rulings of the federal courts sitting in New York which have held that New York's insurance insolvency system is an integral part of the state scheme of insurance regulation, protected from interference by other federal statutes under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)(1982).[1] This integrated, unified system would be disrupted by the interjection of federal statutes, such as that in issue here, which do not purport to regulate the business of insurance.

New York's insurance insolvency statute, like similar laws in Maryland and other states, occupies a crucial place in a comprehensive scheme designed to protect the public interest in the fiscal responsibility of insurers and their ability to meet their obligations to policyholders. Among the matters dealt with by the New York Insurance Law, Section 307 (McKinney 1985 & Supp. 1988) requires licensed insurers to render annual statements and Section 310 (McKinney 1985) requires them to submit to periodic examinations of their financial condition. In the event a New York-chartered insurer encounters financial difficulties, a range of remedies may be applied, including court-supervised rehabilitation (§§ 7402-7403) and, where nec-

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1 "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance. . . ."

essary, liquidation (§§ 7405-7406). In these instances, the Superintendent as liquidator steps into the shoes of the insurer and, pursuant to statutory guidelines and court supervision, undertakes to perform and enforce the insolvent company's insurance contracts. The activities of the Superintendent as liquidator implement state policy governing the "relationship between insurer and insured," and the "reliability, interpretation and enforcement" of insurance policies which, as this Court has ruled, is the "core of the 'business of insurance.' " *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

These provisions of New York's insurance code were "adopted pursuant to" the McCarran-Ferguson Act, *Levy* v. *Lewis*, 635 F.2d 960, 963 (2d Cir. 1980). They embody a single, integrated scheme in which liquidation and distribution is a last stage of regulation in the public interest. "The business of insurance is affected with a public interest, and the state has an important and vital interest in the liquidation or reorganization of such a business." 19A J. & J. Appleman, *Insurance Law and Practice*, § 10621, at 4 (1982) (footnote omitted).

In *Law Enforcement Insurance Co.* v. *Corcoran*, 807 F.2d 38 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1896 (1987), the Court of Appeals for the Second Circuit recognized that New York's "comprehensive plan of regulation of insurance companies, with particularly detailed provisions concerning their rehabilitation and liquidation" constituted legislation "on *a matter of special state concern—so declared by the federal McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1015." 807 F.2d at 43 (emphasis added; footnote omitted).

In *Levy* v. *Lewis*, *supra*, the Circuit Court stated:

> "New York State has a complex administrative and judicial system for *regulating and liquidating* domestic insurance companies. . . .
>
> "It is also highly significant that the state scheme has been adopted pursuant to congressional authorization. In the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015,

> Congress mandated that regulation of the insurance industry be left to the individual states. Thus, *the administrative and judicial scheme erected by New York to regulate insurance companies, including that part enabling the institution and implementation of liquidation proceedings, operates pursuant to an express federal policy of noninterference in insurance matters.*" 635 F.2d at 963 (emphasis added).

Levy v. *Lewis* and *Law Enforcement Insurance Co.* v. *Corcoran* were actions asserting federal court jurisdiction of claims against insolvent insurance companies in liquidation. Both cases challenged the exclusive jurisdiction of the state liquidation court. The Second Circuit ruled that the federal courts should abstain from exercising jurisdiction in deference to the primacy of the state insurance insolvency system. *Levy* v. *Lewis*, *supra*, 635 F.2d at 963-67; *Law Enforcement Insurance Co.* v. *Corcoran*, *supra*, 807 F.2d at 43-44.

In *Washburn* v. *Corcoran*, 643 F.Supp. 554 (S.D.N.Y. 1986), the plaintiff sought an order under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (1982), requiring amicus as liquidator to submit a dispute to arbitration. Requiring arbitration would have been contrary to New York law, under which the state liquidation court has exclusive jurisdiction of disputes concerning the liquidation. 643 F.Supp. at 556-57. The federal District Court for the Southern District of New York, following *Levy* v. *Lewis*, *supra*, held that New York's insurance liquidation statute is a state law "*protecting or regulating the relationship between the insurance company and the policyholder,*" and thus is a " '*law[ ] regulating the business of insurance*' " entitled to deference under the McCarran-Ferguson Act. 643 F. Supp. at 556 (emphasis added). The court accordingly held that the Arbitration Act, as a federal statute of general application, must give way under the McCarran-Ferguson Act to New York's insurance insolvency statute. Thus, arbitration could not be compelled where New York's insurance insolvency statute forbade it.

These cases show the view taken of insurance insolvency proceedings by federal courts of the Second Circuit—which is radically different from the view of the Fourth Circuit. They also illustrate the wide range of issues affected by the Fourth Circuit ruling in the case at bar, and the importance of the issue to the Superintendent as liquidator, to the policyholders of New York insurance companies of which he is the guardian, and to receivers and policyholders of insolvent insurance companies chartered in other states. The narrow issue presented by the case, the availability of a first priority for claims asserted by the federal Government, itself is of first importance, bearing as it does on the many insolvent companies owing such debts. In addition to imposing the federal priority statute on state insurance company liquidation, the circuit court decision below endangers the integrity of the entire insurance company insolvency process, as administered throughout the several states pursuant to the Uniform Insurance Liquidation Act and other similar laws. If, as the circuit court held, state insurance company liquidation is not protected by the McCarran-Ferguson Act, crucial components of the system for insurance company liquidation will be at risk of being superseded by federal statutes of general application, with unpredictable results for policyholders and others whose rights are protected by that system.

Congress has chosen, by the McCarran-Ferguson Act, to leave the regulation of insurance to the states, and the states, including the State of New York, have in response enacted detailed codes of insurance regulation, including liquidation provisions. The state insurance insolvency system protects the interests of policyholders. State laws that protect policyholders of an insolvent insurance company clearly regulate the "business of insurance", as expressly recognized by the Second Circuit. The Fourth Circuit's ruling in the case at bar creates a conflict with those rulings and raises a question which requires resolution by the United States Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MATHIAS E. MONE
80 Pine Street
New York, New York 10005
(212) 701-3000
Counsel of Record for
Amicus Curiae

Of Counsel:

JOSEPH TERMINI
TERMINI & EPSTEIN
123 William Street
New York, New York 10038
(212) 341-6400

MARC J. KORPUS
THOMAS J. MCKENNA
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000